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MARS TELECOMMUNICATIONS SDN BHD v. CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION)

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
PRASAD SANDOSHAM ABRAHAM JCA
B ZALEHA YUSOF J
[CIVIL APPEAL NO: W-02-(NCC)(W)-563-04-2015]
12 JULY 2017

C ***CONTRACT:*** *Breach – Agreement – Sale and purchase of property – Tenant made offer to purchase land with earnest deposit of one million – Several requests for extension of time for execution of sale and purchase agreement made – Owner issued caution that at every request for extension of time amount paid would be treated as deposit and liable to be forfeited – Failure to execute sale and purchase agreement – Whether amount paid represented damages suffered by owner – Whether owner* D *entitled to forfeit earnest deposit in sum of three million as liquidated damages – Whether owner entitled to claim interest of RM40,000 from tenant – Whether owner entitled to counterclaim for utility payments – Contracts Act 1950, s. 75*

The respondent was the owner of a piece of land ('the land') that was charged to OCBC Bank (Malaysia) Berhad ('OCBC') as a secured creditor of the E respondent. OCBC presented a petition to wind up the respondent, which was granted by the High Court. The appellant, one of the tenants of the respondent prior to the winding up, had sub-let its tenanted area to University Teknikal Malaysia Melaka, which operated its university campus over the sublet area. In exercise of their duties, the liquidators appointed to F manage the affairs of the respondent carried out a public tender for the sale of the land together with the assets thereon. The appellant made an offer to purchase the land together with the assets for a total consideration of RM90 million, with an earnest deposit of one million to be paid. The offer was accepted by the liquidators. *Vide* a letter of acceptance to the appellant, the G respondent accepted the offer on the terms containing in the information memorandum. Amongst the terms of the offer in cl. 2.6 of the information memorandum, a sale and purchase agreement ('SPA') must be signed within 30 days from the letter of acceptance. On 3 November 2011, the appellant paid the RM1 million as earnest deposit pursuant to cl. 2.5. The next day, the appellant sought for an extension of time ('the first extension') to execute H the SPA, which was duly granted by the liquidators on the condition that a further deposit of RM1 million be made, and if on the date of 23 November 2011 the SPA was not executed, the aggregate deposit of RM2 million will be forfeited as agreed liquidated damages. The appellant in turn requested for a reduction of the requested RM1 million payment to RM500,000 instead, I which was accepted by the respondent with a caution that if the SPA was not executed on 23 November 2011, the deposit in total of RM1.5 million would be forfeited. Thereafter, there were three further requests for extension made

by the appellant. An agreed non-refundable interest of RM40,000 was also imposed and paid by the appellant. The appellant was told that 25 January 2012 would be the final extension. A further request to extend to 24 February 2012 was rejected by the respondent. Up to then, the appellant had made a total payment of RM3 million plus RM40,000 as interests. The appellant filed a suit against the respondent, amongst others, claiming for breach of tenancy agreement, compensation for tenancy due from the sub-tenant, a declaration that the forfeiture of the total payment of RM3,040,000 was unlawful, and alternatively the respondent was only entitled to forfeit RM1 million earnest deposit paid. Three main grounds of appeal arose herein (i) whether the respondent was entitled to forfeit the earnest deposit in the sum of RM3 million as liquidated damages; (ii) whether the respondent was entitled to claim interest of RM40,000 from the appellant; and (iii) whether the respondent was entitled to counterclaim for utility payments in the sum of RM503, 876.10 from the appellant.

Held (allowing appeal in part)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) No vendor can recover or retain all sums paid under a contract of sale of property and at the same time retain the property, without proof by evidence of the extent of loss or damages he suffers, as a result of a breach by the purchaser. There is a need to prove actual damage or reasonable compensation before the amount stipulated in a contract can be forfeited upon breach. Thus, whether or not the sum stipulated in a contract is a penalty or otherwise is a matter of construction. Unless the court is satisfied that the stipulated sum is a genuine pre-estimate representing a reasonable sum of loss suffered, then only would it allow the sum to be paid as damages. Under s. 75 of the Contracts Act 1950 ('Contracts Act'), damage must first be established. (paras 18 & 19)

(2) The communication between the parties showed that the respondent had indeed issued caution that the failure to adhere to the term would liable itself to a forfeiture of payment made at every extension granted. However, there was no evidence adduced to support a case that this amount would represent the damages suffered by the respondent from the breach by the appellant or a genuine pre-estimate of loss as required under s. 75 of the Contracts Act. Besides the repeated caution made by the respondent at each occasion of extension, there was no agreement made by the appellant that they were purely deposit and hence liable to be forfeited. At the point of entering into agreement, it was only RM1 million that was agreed as an earnest deposit. The appellant did not dispute that the RM1 million paid was a deposit. The judge had fallen into error in finding that the amount paid by the appellant were all agreed to by the appellant as pure deposits. (paras 24 & 25)

(3) In forfeiting the payment made, the respondent not only failed to adduce any evidence to prove that they suffered any damage, they had also failed to prove that the whole sum forfeited was a reasonable

compensation which the respondent would be entitled to forfeit, as envisaged by s. 75 of the Contracts Act. When the respondent imposed as a condition for extension of a payment of RM1 million, it was reduced to RM500,000 at the request of the appellant. If the RM1 million imposed represented the loss suffered or a genuine pre-estimation of loss suffered by the respondent, then it would be difficult to appreciate why the RM1 million could be negotiated downwards to half. Thus, the payment made or imposed on the appellant would not be a mere deposit. As such, s. 75 of the Contracts Act must be adhered to before the respondent becomes entitled to forfeit them. (para 27)

(4) The RM40,000 interest claimed by the respondent was for the delay in the payment of the total earnest deposit under the SPA which was based on the balance of deposit RM6 million. This interest was imposed on the appellant to pay after a number of extensions granted to execute the SPA. The RM6 million deposit was not due to be paid until the SPA was signed. Since the SPA had not been executed, the deposit under the SPA was not due to be paid, as cl. 2.6.1 had not kicked in. Thus, the judge had erred in allowing the respondent to forfeit the interests of RM40,000 paid. (para 29)

(5) As to the issue whether the judge was correct in holding that the respondent was entitled to a counterclaim for utility payments in the sum of RM503, 876.10 from the appellant, it was held that since the land was sold subject to tenancies, the appellant's subletting would continue to subsist. With the tenancy subsisting, the appellant would continue to collect utility payments from the subtenant and the appellant therefore could not claim this sum from the respondent. The judge was therefore correct in his finding on the counterclaim. (paras 14 & 31)

***Bahasa Malaysia** Headnotes*

Responden pemilik sebidang tanah ('tanah') yang digadaikan kepada OCBC Bank (Malaysia) Berhad ('OCBC') sebagai pemiutang bercagar responden. OCBC mengemukakan petisyen untuk menggulung responden dan ini dibenarkan oleh Mahkamah Tinggi. Perayu, salah seorang penyewa responden sebelum digulung, telah menyewakan kawasan yang disewanya itu kepada Universiti Teknikal Malaysia Melaka, yang menjalankan kampus universiti di kawasan tersebut. Dalam menjalankan tugas mereka, pelikuidasi yang dilantik untuk mengurus hal ehwal responden telah melaksanakan tender awam untuk penjualan tanah itu bersama-sama dengan aset-aset di atasnya. Perayu membuat tawaran untuk membeli tanah itu bersama-sama dengan aset-asetnya untuk pertimbangan keseluruhan RM90 juta, dengan deposit wang cengkeram satu juta untuk dibayar. Tawaran diterima oleh pelikuidasi. Melalui surat penerimaan kepada perayu, responden menerima tawaran tersebut atas syarat-syarat yang terkandung dalam memorandum maklumat. Antara syarat-syarat tawaran dalam kl. 2.6 memorandum maklumat, satu perjanjian jual beli ('PJB') harus ditandatangani dalam

tempoh 30 hari dari surat penerimaan. Pada 3 November 2011, perayu membayar RM1 juta deposit wang cengkeram menurut kl. 2.5. Sehari selepas itu, perayu menuntut pelanjutan masa ('pelanjutan pertama') untuk melaksanakan PJB dan ini dibenarkan oleh pelikuidasi dengan syarat bahawa deposit selanjutnya berjumlah RM1 juta dibuat, dan jika pada tarikh 23 November 2011 PJB masih tidak dilaksanakan, deposit agregat sebanyak RM2 juta akan dilucuthakkan sebagai ganti rugi jumlah tertentu. Perayu meminta bayaran RM1 juta dikurangkan kepada RM500,000 dan ini diterima oleh responden dengan amaran jika PJB tidak dilaksanakan pada 23 November 2011, keseluruhan deposit RM1.5 juta akan dilucuthakkan. Seterusnya, terdapat tiga lagi permintaan untuk pelanjutan masa dibuat oleh perayu. Faedah yang tidak dapat dikembalikan berjumlah RM40,000 juga dikenakan dan dibayar oleh perayu. Perayu diberitahu bahawa 25 Januari 2012 adalah pelanjutan masa yang terakhir. Permintaan pelanjutan masa ke 24 Februari 2012 ditolak oleh responden. Perayu telah membuat bayaran keseluruhan berjumlah RM3 juta dengan tambahan RM40,000 sebagai faedah. Perayu memfailkan guaman terhadap responden, antara lain, menuntut pelanggaran perjanjian penyewaan, ganti rugi untuk penyewaan daripada sub-penyewa, satu deklarasi bahawa pelucuthakkan jumlah bayaran RM3,040,000 tidak sah, dan secara alternatif responden hanya berhak melucut hak deposit wang cengkeram RM1 juta yang dibayar. Tiga alasan utama rayuan timbul di sini (i) sama ada responden berhak melucut hak deposit wang cengkeram berjumlah RM3 juta sebagai ganti rugi jumlah tertentu; (ii) sama ada responden berhak menuntut faedah RM40,000 dari perayu dan (iii) sama ada responden berhak menuntut balas bayaran utiliti berjumlah RM503,876.10 daripada perayu.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Tiada penjual boleh menebus atau mengekalkan semua jumlah yang dibayar bawah kontrak penjualan tanah dan pada waktu yang sama mengekalkan tanah, tanpa bukti atau keterangan berkenaan takat kehilangan atau ganti rugi yang dialaminya, akibat pelanggaran oleh pembeli. Terdapat keperluan membuktikan kerugian sebenar atau pampasan yang munasabah sebelum jumlah ditetapkan dalam kontrak boleh dilucuthakkan apabila pelanggaran berlaku. Dengan itu, sama ada jumlah yang ditetapkan dalam kontrak adalah penalti atau tidak adalah hal perkara pembentukan. Hanya apabila mahkamah berpuas hati bahawa jumlah yang ditentukan adalah pra-anggaran tulen mewakili jumlah munasabah kerugian yang dialaminya, barulah jumlah tersebut dibenarkan dibayar sebagai ganti rugi. Di bawah s. 75 Akta Kontrak 1950 ('Akta Kontrak'), kerugian harus dibuktikan.

(2) Komunikasi antara pihak-pihak menunjukkan responden telah mengeluarkan amaran bahawa kegagalan mematuhi syarat akan menyebabkan pelucuthakkan bayaran yang dibuat setiap kali pelanjutan masa dibenarkan. Walau bagaimanapun, tiada keterangan dikemukakan

untuk menyokong kes bahawa jumlah ini mewakili kerugian yang dialami responden akibat pelanggaran perayu atau pra-anggaran tulen kehilangan seperti yang ditetapkan bawah s. 75 Akta Kontrak. Selain amaran yang sering diberikan oleh responden pada setiap pelanjutan masa, tiada persetujuan dibuat oleh perayu bahawa ia adalah deposit semata-mata dan dengan itu harus dilucuthakkan. Pada waktu memasuki perjanjian, hanya RM1 juta dibayar sebagai deposit. Perayu tidak mempertikaikan bahawa RM1 juta dibayar sebagai deposit. Hakim telah terkhilaf apabila memutuskan jumlah yang dibayar oleh perayu dipersetujui oleh perayu sebagai deposit-deposit.

(3) Dalam melucuthakkan pembayaran yang dibuat, responden bukan sahaja gagal mengemukakan keterangan untuk membuktikan mereka mengalami apa-apa kerugian, mereka juga gagal membuktikan bahawa jumlah keseluruhan yang dilucuthakkan adalah pampasan munasabah yang responden berhak melucuthakkan, seperti yang dibayangkan oleh s. 75 Akta Kontrak. Apabila responden mengenakan syarat bayaran RM1 juta untuk pelanjutan masa, ia telah dikurangkan kepada RM500,000 atas permintaan perayu. Jika RM1 juta yang dikenakan mewakili kerugian yang dialami atau adalah satu pra-anggaran tulen kerugian yang dialami responden, adalah sukar untuk menerima kenapa RM1 juta boleh dirundingkan kepada setengah daripada jumlahnya. Oleh itu, bayaran yang dibuat atau dikenakan atas perayu bukan deposit semata-mata. Dengan itu, s. 75 Akta Kontrak harus dipatuhi sebelum responden berhak melucuthakkannya.

(4) Faedah RM40,000 yang dituntut oleh responden adalah untuk bayaran lewat jumlah keseluruhan deposit wang cengkeram bawah PJB berdasarkan baki deposit RM6 juta. Faedah ini dikenakan atas perayu selepas beberapa pelanjutan masa melaksanakan PJB dibenarkan. Deposit RM6 juta tidak perlu dibayar sehingga PJB ditandatangani. Oleh kerana PJB tidak dilaksanakan, deposit bawah PJB tidak perlu dibayar, kerana kl. 2.6.1 tidak mempunyai kesan. Oleh itu, hakim terkhilaf dalam membenarkan responden melucuthakkan faedah RM40,000 yang dibayar.

(5) Berkenaan isu sama ada hakim betul dalam memutuskan perayu berhak menuntut balas bayaran utiliti dalam jumlah RM503,876.10 daripada responden, ia diputuskan oleh kerana tanah dijual tertakluk kepada penyewaan, sub-penyewaan oleh perayu akan terus wujud. Dengan kewujudan sub-penyewaan, perayu akan terus mengutip bayaran utiliti daripada sub-penyewa dan perayu tidak boleh tuntut jumlah ini daripada responden. Hakim dengan itu betul dalam dapatannya berkenaan tuntutan balas ini.

Case(s) referred to:
Hadley v. Baxendale (1854) 9 Exch. 341 ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2009] 4 CLJ 569 FC ***(refd)***
Linggi Plantations Ltd v. Jagatheesan [1971] 1 LNS 66 PC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Haji Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd [1987] 2 CLJ 423; [1987] CLJ (Rep) 345 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 74, 75

Other source(s) referred to:
S Santhana Dass, *General Principle of Contract Law,* 2nd edn, p 7.267

For the appellant - Ravi Nekoo, Abdul Hakem Arabia & M Monaganambal; M/s Hakem Arabi & Assocs
For the respondent - Wong Chee Lin; M/s Skrine

[Editor's note: For the High Court judgment, please see Mars Telecomunications Sdn Bhd v. Cubic Electronics Sdn Bhd & Anor [2013] 1 LNS 1156 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JCA:

[1] The respondent in this appeal was the owner of a piece of land held under PT No. 6960, HS (M) No. 725, Mukim Bukit Katil, Daerah Melaka Tengah, Negeri Melaka which is 1,234,197 sq ft in area ("the land") together with plants and machineries ("assets") thereon. The land was charged to OCBC Bank (Malaysia) Berhad (OCBC), as a secured creditor of the respondent. OCBC presented a petition to wind up the respondent and was granted by Shah Alam High Court on 25 July 2011. Two liquidators were appointed to manage the affairs of the respondent thereafter.

[2] The appellant was one of the tenants of the respondent prior to the winding up. The appellant had sub-let its tenanted area to University Teknikal Malaysia Melaka, which operated its university campus over the sublet area.

[3] In exercise of their duties, the liquidators on behalf of the respondent carried out a public tender for the sale of the land together with the assets thereon. For that purpose, an information memorandum dated 15 September 2011 was prepared (see pp. 35 to 54 of the core bundle). The sale of the land was to be on an "as is where is" basis, subject to all existing tenancy agreements (see p. 38 of the core bundle). The tender exercise was to be closed on 14 October 2011.

[4] The appellant made an offer to purchase the land together with the assets for a total consideration of RM90 million, with an earnest deposit of RM1 million to be paid. The consideration of RM90 million was made up of RM80 million for the land and RM10 million for the assets. The offer was accepted by the liquidators because it was higher than the valuation made by their appointed valuers. The tender was then aborted.

[5] *Vide* a letter of acceptance to the appellant dated 7 October 2011 (see pp. 70 to 71 of the core bundle), the respondent accepted the offer on the terms containing in the information memorandum (see pp. 35 to 71 of the core bundle). Both parties were represented by solicitors where the respondent was represented by Messrs Skrine & Co and the appellant by Messrs Jayaratnam & Partners.

[6] Amongst the terms of the offer in cl. 2.6 of the information memorandum, a sale and purchase agreement ("SPA") must be signed within 30 days from the letter of acceptance dated 7 October 2011. The due date for the execution would therefore be 6 November 2011. The acceptance was subjected to the terms in the information memorandum. We reproduce below the relevant clauses of the terms governing the parties at this stage, for better appreciation of the issues raised. We have also highlighted the more pertinent clauses in bold.

2.5 Earnest Deposit

2.5.1 (a) All offers for the Property must be accompanied by a sum equivalent to 2% of the Offer Price (hereinafter referred to as "ED"). The Offer Price shall be in Ringgit Malaysia ("RM").

(b) All offers for the Machinery must be accompanied by a sum equivalent to 10% of the Offer Price (hereinafter referred to as "ED"). The Offer Price shall be in Ringgit Malaysia ("RM").

(c) The ED is to be paid by way of a bank draft or cashier's order made out in favour of "CUBIC ELECTRONICS SDN BHD (IN LIQUIDATION)" and sent to:

Cubic Electronics Sdn Bhd (In Liquidation)
c/o BDO Consulting Sdn Bhd
12th Floor, Menara Uni. Asia
1008, Jalan Sultan Ismail
50250 Kuala Lumpur
Malaysia

Any offer not accompanied by the prescribed ED will NOT be considered.

2.5.2 Upon issuance of the LOA to the Purchaser(s), the ED shall be treated as payment of the deposit and/or applied towards the Offer Price. In the event one (1) of the offers is successful, the Liquidators reserve the right to use the total ED as part payment for the Successful Offer Price.

2.5.3 Where the Purchaser(s) fails to sign the SPA pursuant to Section 2.6, the Liquidators shall reserve the rights to cancel the sale and absolutely forfeit the ED paid pursuant to Section 2.5.1 as agreed liquidated damages and not by way of penalty.

2.5.4 ED of the tenderer(s), who withdraw their offers prior to being notified of the outcome by the Liquidators, will be forfeited.

2.5.5 ED will be refunded to the tenderer(s), free of any interest, if their offers are not accepted by the Liquidators, in accordance with Section 2.13.4.

2.6 Sale of the Property or Property and Machinery

2.6.1 The SPA must be signed within thirty (30) days of the Liquidators' notification to the Purchaser(s) that his/her respective offer has been accepted unless otherwise extended by Liquidators at their absolute discretion. A deposit of 10% of the Offer Price ("the Deposit") is payable upon execution of the SPA. In this regard, the ED pursuant to Section 2.5 shall be applied towards the payment of the Deposit.

2.6.2 Any provisions in the SPA which are in addition to or different from the terms set out in this Memorandum shall be subject to the sole agreement of the Liquidators.

2.6.3 Payment in Ringgit Malaysia of the balance (i.e. Offer Price less the Deposit) must be made to:

Cubic Electronics Sdn Bhd (In Liquidation)
c/o BDO Consulting Sdn Bhd
12th Floor, Menara Uni. Asia
1008, Jalan Sultan Ismail
50250 Kuala Lumpur
Malaysia

via a bank draft or cashier's order within 3 months from the date of the SPA or within 14 days of the fulfilment or waiver of the agreed conditions precedent (if any), whichever is later unless otherwise extended by the Liquidators at their absolute discretion.

2.6.4 Where the Purchaser(s) fails to pay in full the balance within the prescribed time in accordance with Section 2.6.3, the Liquidators shall reserve the rights to cancel the sale and forfeit the Deposit made pursuant to Section 2.6.1 as agreed liquidated damages and not by way of penalty.

[7] From the above clauses, the appellant would have to pay an earnest deposit under cl. 2.5 upon acceptance of its offer by the respondent and the SPA was to be executed within one month from the date of acceptance unless extended by the liquidators at their absolute discretion. Only upon signing of the SPA cl. 2.6.1 will kick in where, a 10% deposit pursuant to the SPA would have to be paid by the appellant/purchaser.

[8] On 3 November 2011, the appellant paid the RM1 million as earnest deposit presumably pursuant to cl. 2.5. The next day, on 4 November 2011 by the solicitors' letter from Jayaratnam & Partners to Skrine, the appellant

A sought for an extension of time until 23 November 2011 ("the first extension") to execute the SPA. The extension was duly granted by the liquidators on the condition that a further deposit of RM1 million be made and if on the date of 23 November 2011, the SPA is not executed, the aggregate deposit of RM2 million will be forfeited as agreed liquidated B damages and not by way of penalty.

[9] The appellant in turn requested for a reduction of the requested RM1 million payment to RM500,000 instead. This was accepted by the respondent with a caution that if the SPA is not executed on 23 November 2011, the deposit in total of RM1.5 million will be forfeited (see pp. 171 to C 172 of the core bundle). On 11 November 2011, the appellant paid the sum of RM500,000.

[10] Thereafter, there were another three further requests for extension made by the appellant. The second extension was agreed with a further payment of RM500,000 and the signing of SPA was extended to another D month to 23 December 2011. The respondent cautioned the appellant again that the amount would be treated as deposit and liable to be forfeited. Another extension ensued for the third time to another month to 23 January 2012 when the respondent agreed, and a payment of RM1 million was made. Yet again the extended date of 23 January 2012 was sought to be further E extended to 25 January 2012 by the appellant, which was agreed to by the respondent with the same caution. This time an agreed non-refundable interest of RM40,000 was also imposed and paid by the appellant. The appellant was told that 25 January 2012 would be the final extension. A further request to extend to 24 February 2012 was rejected by the respondent.

F **[11]** Up to then, and in all the appellant had made a total payment of RM3 million plus RM40,000 as interests. Upon the failure of the appellant to execute the SPA on 25 January 2012, the respondent forfeited the total RM3 million paid plus the interests of RM40,000.

G **[12]** Apart from the above narration, the appellant claimed that it was also sued by another party MKC Corporate & Business Advisory Sdn Bhd (MKC) on the ground that the appellant had entered into the tenancy agreement with the respondent wrongly.

[13] The appellant in fact filed a suit against the respondent and second H defendant (OCBC). The suit against the second defendant was withdrawn. Against the respondent, the appellant was claiming for breach of tenancy agreement, compensation for tenancy due from the sub-tenant (UTEM), a declaration that the forfeiture of the total payment of RM3,040,000 was unlawful, and alternatively the respondent was only entitled to forfeit RM1 million earnest deposit paid and the refund of the other part of the payment. I In fact, the pleadings filed by the appellant was so convoluted with other side issues, and so verbose, making a simple complaint so complex. We would refrain ourselves from making any further comment on the claim made, since they are not relevant for the purpose of the appeal before us.

[14] Before us, learned counsel for the appellant confined the complaints of the appellant into three main grounds of appeal which we rephrased as below:

(i) whether the learned judge was correct in holding that the respondent was entitled to forfeit the earnest deposit in the sum of RM3 million as liquidated damages;

(ii) whether the learned judge was correct in holding that the respondent was entitled to claim interest of RM40,000 from the appellant; and

(iii) whether the learned judge was correct in holding that the respondent was entitled to counterclaim for utility payments in the sum of RM503,876.10 from the appellant.

Our Decision

[15] On the first issue, the appellant premised its submission on the basis that the forfeiture of the RM3 million was in contravention of s. 75 of the Contracts Act 1950. In the alternative, by its pleadings, the appellant agreed that the RM1 million only would be liable to be forfeited as deposit and the balance should be refunded to the appellant.

[16] Generally speaking, s. 75 of the Contracts Act does away with the distinction between liquidated damages and penalties as understood under English law. The Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 sets out the guiding principles in construing the application of s. 75. In that case, the facts of which were these. Both parties were medical practitioners. The respondent sold his medical practice to the appellant in 1988 for RM120,000 to be paid by instalments. A total of RM96,000 had already been paid including RM12,000 earnest money when the appellant defaulted the last six. The agreement contained a forfeiture clause which allowed all monies paid to be forfeited upon breach, as liquidated damages. The respondent forfeited the whole of RM96,000 upon breach by the appellant under the forfeiture clause. The Federal Court having gone through a list of Indian cases dealing with s. 74 of the Contracts Act which is in *pari materia*, held that the whole sums paid cannot be retained unless there was proof by evidence that there was loss or damage that was suffered.

[17] The principles laid down in *Selva Kumar* were reaffirmed by the Federal Court in *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2009] 4 CLJ 569. The case involved a sale and purchase of two lots of lands for a price consideration of RM4,590,000 and RM10,830,000 each. The purchase price was to be paid by six instalments. Initial payment of 12% was made and subsequently there was payment up to 50% of the purchase price. The High Court ordered the appellant to refund the whole amount as no actual damage was proved, to justify the forfeiture made by the respondent therein. The Court of Appeal allowed the appeal in part by ordering that the appellant was entitled only to the 12% paid as deposit. The Federal Court agreed with the Court of Appeal that the 12% paid was an earnest deposit and the respondent was entitled to forfeit the same. The other payment on

top and above that, was ordered to be refunded. The Federal Court then reaffirmed the decision in *Selva Kumar* and declared that it is still good law on the application and operation of s. 75.

[18] The principle enunciated by the Federal Court is that in relation to a purchase of property, no vendor can recover or retain all sums paid under a contract of sale of property and at the same time retain the property, without proof by evidence of the extent of loss or damage he suffers, as a result of a breach by the purchaser. In essence, the distinction between liquidated damages and penalty has ceased to be of any legal importance because the end result in either case is that, the court must determine what amounts to a reasonable compensation. The legal position was further reaffirmed in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501.

[19] In effect, the Federal Court in both *Selva Kumar* and *Johor Coastal Development Sdn Bhd* held that, there is a need to prove actual damage or reasonable compensation in accordance with the principle in *Hadley v. Baxendale* (1854) 9 Exch. 341, before the amount stipulated in a contract can be forfeited upon breach. Thus, whether or not the sum stipulated in a contract is a penalty or otherwise is a matter of construction. Unless the court is satisfied that the stipulated sum is a genuine pre-estimate representing a reasonable sum of loss suffered, then only will it allow the sum to be paid as damages. As a general rule under s. 75, damage must first be established. A party claiming for damages then must prove his loss.

[20] Returning to the instant appeal, it is observed that the communication between parties, the respondent had indeed issued caution that the failure to adhere to the term would liable itself to a forfeiture of payment made at every of the extensions granted, at least four times.

[21] What is clear in the present case was that no evidence was adduced before the court to support a case that this amount would represent the damages suffered by the respondent from the breach by the appellant or a genuine pre-estimate of loss as required under s. 75. The learned High Court Judge in respect of this issue held as follows:

> [24] I also agree that the First Defendant had every right to forfeit the deposits in total of RM3 million which was paid by the Plaintiff. The Plaintiff is totally aware that the deposits were forfeited as agreed liquidated damages and not penalty as it was informed by the First Defendant before the deposits were paid. I also agree that the deposits being forfeited do not contravene s. 75 of the Contracts Act 1950 which states:
>
> > When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive

> from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> [25] The court is of the finding the deposits paid amounting to RM3 million are true deposit, where the First Defendant need not prove loss or damage. Therefore the above provision of the Contracts Act 1950 is not applicable. The deposits paid are earnest deposit as agreed by the parties.

[22] From the above paragraphs, it became clear that the learned judge had made his finding that the payments made by the appellant were agreed to by the parties as deposits and not penalty. Following that finding, the learned judge held that s. 75 was of no application, because deposits are liable to be forfeited without proof of damage. The learned judge then referred to a line of cases in support of that legal position. The first case was *Sun Properties Sdn Bhd & Ors v. Happy Shopping Plaza Sdn Bhd* [1987] 2 CLJ 423; [1987] CLJ (Rep) 345; [1987] 2 MLJ 711, followed by the Federal Court's case of *Morello Sdn. Bhd. v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577. The third is the decision of the Privy Council in *Linggi Plantations Ltd v. Jagatheesan* [1971] 1 LNS 66; [1972] 1 MLJ 89 where deposit can be forfeited on the default of the purchaser despite the vendor not in a position to prove actual damage flowing from the purchaser's breach of the contract.

[23] We agreed with the learned judge on the legal position that deposits are generally speaking, liable to be forfeited without proof of damage. However, we are not able to appreciate the conclusion arrived at by the learned judge that the amount paid by the appellant was all agreed to by the appellant as deposit. The learned High Court Judge had not given any reason why he concluded that both parties agreed for the payment to be an earnest deposit.

[24] What we could discern from the communication between parties on the payment made by the appellant was that, at every request for extension of time, the respondent had stated that the amount paid would be treated as deposit and would be liable to be forfeited. This the respondent did without fail, on each time the respondent granted for a request of extension. The first extension was granted with an imposition of RM1 million which was negotiated downwards to RM500,000. Besides the repeated caution made by the respondent at each occasion of extension, we did not find an agreement made by the appellant that they were purely deposit and hence liable to be forfeited.

[25] At the point of entering into agreement, it was only RM1 million that was agreed as an earnest deposit. The liability to pay an agreed deposit of RM9 million as suggested by learned counsel for the respondent had not arisen as the SPA had not been executed. At the point in time, the liability of the appellant to pay was an earnest deposit as stipulated under cl. 2.5 of the information memorandum which we have alluded to above. Offer for the property (land) was made at RM80 million hence 2% of it would be RM1.6 million. The offer for the assets was RM10 million hence 10% of it would be RM1 million. The appellant did not dispute that the RM1 million paid

was a deposit. The learned judge in our view, had fallen into error in finding that the amount paid by the appellant were all agreed to by the appellant as pure deposits.

[26] We have also to bear in mind that despite the label stated or used by the respondent, it does not always necessarily mean what it says. We were guided in our view by the decision of the Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd (supra)* which clearly held that label of 'deposit' or 'penalty' does not necessarily mean so. It befalls upon the court therefore to construe the same. A penalty or liquidated damages is a payment stipulated in *terrorem* of the offending party. It has therefore to be decided and determined upon the inherent circumstances of every case.

[27] In forfeiting the payment made, the respondent not only failed to adduce any evidence to prove that they suffered any damage, they had also failed to prove that the whole sum forfeited was a reasonable compensation which the respondent would be entitled to forfeit, as envisaged by s. 75 of the Contracts Act. Far from proving loss, the amount imposed to be paid upon extension appeared to be a figure simply plugged from mid-air upon the request made. We said so because when the respondent imposed as a condition for extension of a payment of RM1 million for example, it was reduced to RM500,000 at the request of the appellant. If the RM1 million imposed represented the loss suffered or a genuine pre-estimate of loss suffered by the respondent then it would be difficult to appreciate why the RM1 million could be negotiated downwards to half. In this regard, we were agreeable to accept the submission of learned counsel for the appellant that the payment made or imposed on the appellant would not be a mere deposit. As such s. 75 must be adhered to before the respondent became entitled to forfeit them.

[28] Learned author S Santhana Dass on *General Principle of Contract Law* 2nd edn, at p. 7.267 observed that, any sum which has already been paid, other than as earnest money, before a breach, and even though referred to as a "deposit" under the contract and which is subject to forfeiture under the terms of the contract is not liable to be forfeited *per se*. Section 75 of the Contracts Act 1950 may be invoked and a reasonable compensation awarded according to the damage suffered by the vendor as a result of the breach. We therefore were inclined to hold that the amount that was liable to be forfeited by the respondent in this case was only be the RM1 million earnest deposit.

[29] We then next dealt with the issue of RM40,000 interest. The learned High Court Judge found this payment of interest liable to be forfeited. The RM40,000 interest claimed by the respondent was for the delay in the payment of the total earnest deposit under the SPA which was based on the balance of deposit of RM6 million (see p. 183 of the core bundle). This interest was imposed on the appellant to pay after a number of extensions granted to execute the SPA. In our view, the RM6 million deposit was not due to be paid until the SPA is signed. Since the SPA had not been executed,

the deposit under the SPA was not due to be paid, as cl. 2.6.1 had not kicked in. We therefore agreed with the appellant that the learned judge had erred in allowing the respondent to forfeit the interests of RM40,000 paid.

[30] On the claim of rental and utilities by the appellant, the learned High Court Judge at para. 33 of his grounds of judgment states his finding as below:

> Further this court cannot agree on the loss purportedly suffered by the Plaintiff because of what is supposedly due as rental for 47 months from UTEM to the Plaintiff as a result of the termination of the agreement. This is because the sale of the land and properties of the First Defendant to NNSB is still subject to all tenancies including the tenancy agreement between the plaintiff and UTEM. This would mean NNSB must still honour the tenancy between Plaintiff and UTEM. It is therefore untrue to suggest that Plaintiff has suffered the loss of that rental and utilities it had with UTEM. The tenancy is still subsisting even when the land and properties were sold to NNSB.

[31] We agreed with the learned judge's finding on this issue. Since the land was sold subject to tenancies, the appellant's subletting would continue to subsist. With the tenancy subsisting, the appellant would continue to collect utility payments from the sub-tenant and the appellant therefore cannot claim this sum from the respondent. The learned judge was therefore correct in his finding on the counterclaim. We found no appealable error on this issue that warrants appellate interference.

[32] For all the abovestated reasons, we allowed the appellant's appeal in part. We found the payment of RM3 million was not a pure deposit. Thus out of the RM3 million paid by the appellant, only RM1 million was an earnest deposit. We set aside that part of the order of the High Court. We made a further order for the respondent to refund the balance to the appellant as prayed in para. 54(e) of the amended statement of claim. We further found the interest payment of RM40,000 was not due to be paid and ordered for the refund of the same. The other remaining orders of the High Court were affirmed.

[33] Both my learned brother Prasad Sandosham JCA and my learned sister Zaleha Yusof J have read this judgment in draft, and had expressed their agreement on the same.